THE MARTIN B. BROWN COMPANY, Printers, 49 to 57 Park Place, N. Y.

No. 94.
Reply Brf. of Smith & Conway,

Office Supreme Court U. S.
DEC 6 1899
JAMES H. McKENNEY,
Clerk.

Filed Dec. 6, 1899.

Supreme Court of the United States.

THE SARANAC LAND AND TIMBER COMPANY, Plaintiff in Error, *against* JAMES A. ROBERTS, as Comptroller of the State of New York, Defendant in Error.	No. 94. October Term, 1899.

Brief for Plaintiff in Error in Reply.

I.

Constitutionality.

The learned counsel for defendant first insist that the constitutionality of the Short limitation law, chapter 448 of the Laws of 1885, is not an open question because of the decision of this Court in *Turner* vs. *The People*. They, then, in their third point, endeavor to meet the arguments against the validity of that law by pointing out the remedies which they conceive to have existed in favor of the land-owner as against the State, while the six months allowed by the new law was running.

The existence and efficiency of these alleged remedies must be considered with reference to the situation as it was when the new limitation statute went into operation in June, 1885. That situation was that in 1877 the land in controversy had been *illegally* sold to the State for unpaid taxes and conveyed to the State by the Comptroller in 1881. No one—neither the State nor the owner—was in *actual* possession, the land being wild, vacant forest land. This sale, as shown in our principal brief, did not affect either the title or the constructive possession of the true owner (Brief, p. 21, and 42–50). This being the situation, the State, in 1885, enacted the Short limitation law now in question, and seeks by its aid to make the sale of 1877 and the Comptroller's deed in pursuance of it, both of which were void when made, effectual to transfer title to the State.

The argument of our adversaries concedes that unless *at that time* the land-owner could in some way have effectually asserted his right to the land, as against the State, the new limitation law cannot be sustained.

Four remedies are pointed out, any or all of which it is, impliedly at least, asserted the land-owner might have invoked against the State (Deft.'s Brief, p. 26).

First—*An appeal to the Board of Supervisors.*

It is not easy to see, and the learned counsel for defendant do not point out, how the Supervisors can interfere with sales of land for taxes. They may, to a certain extent, revise and correct assessments, but they have nothing to do with subsequent proceedings.

Second—*A direct action against the Comptroller to vacate the tax deed* (Deft.'s Brief, p. 27).

It is manifest that such an action would be, in effect, an action against the State and could only be maintained if authorized by the Legislature.

It is argued that the new limitation law itself authorized such an action. The words of the statute on which reliance seems to be placed are: "But all such convey-

"ances and certificates, and the taxes and tax sales on "which they are based, shall be subject to cancellation "as now provided by law on a direct application to the "Comptroller, or an action brought before a competent "court therefor."

It is conceded that the direct application to the Comptroller, "as now provided by law," could not have been made. There was no law which so "provided," so far as the land-owner was concerned. An action necessarily presupposes some one to be sued. The statute evidently contemplates an ordinary suit between the land-owner and the tax purchaser, in accordance with existing laws. It does not purport to give any new remedy.

People *ex rel.* Wright *vs.* Chapin (1887), 104 N. Y., 369, 376.

But whether it be construed as creating a new remedy or recognizing the existence of an old, yet as it is a general law and does not name or refer to the State, it does not authorize an action against the State or against the Comptroller as its representative.

People *vs.* Dennison (1881), 84 N. Y., 272, 282.

Savings Bank *vs.* U. S. (1873), 19 Wall., 227, 239.

In *Savings Bank* vs. *United States*, 19 Wall, 227, STRONG, *J.*, says (p. 239): "It is a familiar principle "that the King is not bound by any act of Parliament, "unless he be named therein by special and particular "words."

THIRD—*An action against the Forest Commission* (Deft.'s Brief, p. 27).

The argument upon this point was anticipated and answered in our principal brief, pp. 27 to 39. See also *Meigs* vs. *Roberts*, *infra*, p. 21.

FOURTH—*A suit to remove a cloud from the title* (Deft.'s Brief, p. 31).

The learned counsel for defendant says, with reference to this alleged remedy:

> "As to all cases where the certificate had been
> "issued for four years or the conveyance recorded
> "for two, at the time the law went into effect, an ac-
> "tion could have been commenced at once to vacate
> "the certificate or deed as a cloud upon the title."

Against whom could such a suit have been brought in a case where the State was the party claiming title under the deed to be attacked? Manifestly the proper party defendant would be the State itself.

Cunningham *vs.* Macon & Brunswick R. R. (1883), 109 U. S., 446.

Counsel do not point out any statute by which the State has consented to be so sued.

As to a suit against the Comptroller to *prevent* a cloud on title, the time had long passed.

We, therefore, respectfully insist that every one of the remedies alleged to have existed in favor of the land-owner, when the new law went into effect, were wholly illusory; that there was no way in which it was possible for the land-owner to have asserted his title as against the State and that the six months' grace tendered him by the statute was but a mockery.

II.

Jurisdictional Defects.

Counsel for defendant insist that the defects alleged in the tax sale of 1877 are not jurisdictional in their nature, but irregularities merely, which are within the scope of the limitation law. The argument upon this point is merely a long quotation from the prevailing opinion in *Marsh* vs. *Ne-ha-sa-ne Park Association*, 25 App. Div., 34. As pointed out in our principal brief, this case cannot be

considered as *settling* the law of New York. It had not been rendered when this action was begun or when it was tried. It is only the judgment of a divided intermediate Court—reversing the trial Court—and is liable to be wholly overthrown by the Court of Appeals. It is not consistent with the later decision of the same court in *Meigs* vs. *Roberts, as Comptroller* (1899), 42 App. Div., 290.

[This case is not yet reported, except in advance sheets. We, therefore, print it in full as part of this brief, see p. 16, *infra.*]

Under these circumstances we submit that it is not conclusive upon this Court, when reviewing a judgment of the Circuit Court.

> Burgess *vs.* Seligman, 107 U. S. (1882), 20, 33.

It is only when a construction of a statute has been adopted by the *highest* Court of the State, or perhaps has been long acquiesced in, that it becomes a "rule of decision" binding on this Court.

> Beecher *vs.* Cheshire R. R. Co. (1887), 125 U. S., 555, 582.
>
> Wade *vs.* Travis County (1898) 174 U. S., 499, 508.

It may be that this Court will hold that the sale of land to pay taxes which it does not owe and is not liable to pay, is merely an irregularity in procedure, but such is not yet the *settled* law of New York.

Counsel for defendant seek to do away with the defect growing out of the uncertain description of the land assessed by claiming that plaintiff waived it by conceding that there was no question of fact for the jury (Defendant's brief, p. 23).

The point of our attack upon the description was that it was impossible to locate the exception of 1215 acres of water because upon the proofs there was either more or less than that area of water within the tract described. Plaintiff gave evidence to show that the true area of those

portions of the Saranac Lakes within the tract was 1,035 acres, that there was not, and for more than thirty years past, had not been any other body of water upon the tract. Defendant met this evidence by proving that during 1866 to 1870 there was a dam across the outlet of the lake which, when closed, raised the level so that the area of land covered by water was on an average about 200 to 250 acres greater than at the time of the trial (Record, p. 23).

We do not see that any question of fact was made by this evidence. Defendant accepted the present area of the lakes as claimed by plaintiff, and plaintiff did not dispute the former existence of the dam. This left the undisputed testimony to the effect that the natural area of the lake was 1,035 acres; the unnatural area—that is the area when the dam was closed—from 1,235 to 1,285 acres. Neither party claimed on the trial that the true area was 1,215 acres.

We submit that the undisputed evidence was such as to entitle the plaintiff to a ruling upon the fifth proposition of law tendered to the Court (Record, p. 24), and that the correctness of the ruling of the trial Judge is properly here for review.

Counsel for defendant practically admits that the seventh proposition of law which plaintiff requested the Court to affirm was correct, and that the seventh assignment of error is well taken. The proposition was in effect that the State got no title by the compulsory bidding in at the 1881 sale—a sale at which no person but the State was allowed to bid.

This is a jurisdictional defect. It has been twice so held by the Appellate Division of the New York Supreme Court, the last case being *Meigs* vs. *Roberts* hereto annexed. Such bidding in is a mere assertion of existing ownership. Counsel seek to avoid the effect of this error by claiming that the 1877 sale was valid, and therefore the assertion of ownership made by the Comptroller by bidding in at the

subsequent sales was true. But we submit that plaintiff is entitled to the benefit of the rule that when there are several issues tried and decided by a general verdict the defendant party is entitled to a new trial if the jury has been misdirected as to any one of them.

Maryland *vs.* Baldwin (1884), 112 U. S., 490.

This action being one properly triable by a jury and having been tried by the Court without a jury, pursuant to section 649 of the Revised Statutes (Record, p. 11), and the Court having made a general finding in favor of defendant (Record, p. 25), such finding is equivalent to a general verdict of a jury and is to be reviewed in a similar way.

Norris *vs.* Jackson (1869), 9 Wall., 125.

In the present case, the answer set up the 1881 tax sale as a separate and distinct defense, and asserted it to be valid and sufficient to convey the land in fee simple to the State (Record, p. 6). The trial Court having clearly erred in regard to the law applicable to this sale, and that error being presented by an appropriate exception, we are entitled to a new trial, for it may very well be that it was the assumed validity of this sale which controlled the Court and induced it to find for the defendant.

III.

Champerty.

It is urged that plaintiff's title is void for champerty. We submit that no such question arises on the present record. It is true that the answer sets up such defense, but it was not passed upon by the trial Court. No ruling was made in regard to it, and, of course, no exception taken which presents any question as to it. The judgment entered, not only dismisses the complaint, but establishes

affirmatively the title of the State (Record, p. 13). The defendant has been successful solely by reason of the tax sale to the State, the validity of which is, of course, the real question. The bill of exceptions contains only a small part of the evidence given on the trial; so much only as was pertinent to the questions raised by the exceptions. If any of these exceptions are valid and such as to entitle plaintiff to a new trial, it ought not to be deprived of it on the ground of champerty. It cannot be said that such defense is so clearly made out that a new trial would be useless.

But there is no just ground for alleging champerty in the deeds to plaintiff.

The champerty statute is to be strictly construed. Says *Seldon, J.*, in *Crary* vs. *Goodman*, 22 N. Y., 177: "It is "the relic of an ancient policy which has been treated with "but little favor by either Legislature or courts in modern "times."

It applies only to lands in *actual* possession.

Dawley *vs.* Brown (1880), 79 N. Y., 390.

Such possession must be under a specific paper title.

Crary *vs.* Goodman (1860), 22 N. Y., 170.

In the present case, the defendant asserted the land to be wild, vacant, forest land and took possession of it as such in January, 1895 (Record, pp. 16–17). The record alleges that no proof of actual posession by plaintiff or its grantors was given, but none was needed. Such lands are always deemed to be in the possession of the true owner.

Bliss *vs.* Johnson (1883), 94 N. Y., 235.

U. S. *vs.* Arredondo (1832), 6 Pet., 691, 743.

Had the deeds to plaintiff been made *after* the Comptroller published the notice, which the statute declares shall clothe him with actual possession, there might have been some color to the claim, but the title of plaintiff was perfected in December, 1894. The Comptroller did

not acquire possession till January, 1895 (Record, p. 17). It is urged that the Forest Commission had actual possession. The position of the learned counsel for defendant is not consistent as to this Commission. For some purpose they treat it as the State, and for other purposes, as an entity distinct from the State. To save the constitutionality of the limitation law they argue that the Commission might have been sued in ejectment, which is possible only by assuming that it is *not* the State. To defeat the title of the plaintiff on the ground of champerty, it is necessary for them to assert that it is the State, for treating it as a separate entity and assuming it to have been in actual possession, yet as it does not claim to have any paper title, the doctrine of *Crary* vs. *Goodman*, 22 N. Y., 170, defeats the claim of champerty.

It must, of course, be plain that the Forest Commission is the State as regards all forest lands, and it must be equally plain that as to such lands there is no *actual* possession. The champerty statute has, therefore, no application. It was so held in the recent case of *Meigs* vs. *Roberts, as Comptroller* (*infra*, p. 16).

So far as section 130 of the Penal Code is concerned, it has no application, inasmuch as plaintiff claimed under a grant from the State itself (Record, p. 16).

Wright *vs.* Syracuse, Ontario & W. R. R. (1895), 92 Hun, 32.

The reason for the law against champerty has no application with regard to land which, if held adversely at all, is so held by the State. That reason was that under cover of such deeds "pretended titles might be granted to great "men whereby right might be trodden down and the "weak oppressed" (Coke Litt., 214*a*; see also opinion of Kent, *C. J.*, in *Jackson* vs. *Hudson* (1808), 3 John., 375).

The rights of the State of New York are in no danger of being "trodden down"; neither is it so weak as to be liable to oppression at the hands of this New Jersey corporation. *Cessante ratione legis cessat ipsa lex.*

IV.

Jurisdiction of the Circuit Court.

The defendant challenges the jurisdiction of the Circuit Court on the ground that the suit does not involve a controversy properly within its jurisdiction and that plaintiff has been made a party collusively and the attempt is made to bring the case within the recent ruling of this Court in *Lehigh Mining and Manufacturing Co.* vs. *Kelly,* 160 U. S., 327.

We submit that such question does not properly arise on this record.

1. Defendant has obtained judgment not only dismissing the complaint, but establishing affirmatively the title of the State to the land. The defendant now asks by his brief that this judgment be affirmed and yet in the same breath he seeks to impeach the jurisdiction of the Court which has rendered judgment in his favor.

2. The cause is here for review, on a strict bill of exceptions and contains only the evidence material to the exceptions taken by the defeated party. The plaintiff, having invoked the jurisdiction, of course does not assail it, and defendant having taken an affirmative judgment in his favor cannot.

3. The objection now urged against the jurisdiction by the Circuit Court ought to have been raised by plea to the jurisdiction and before a trial on the merits.

Deputron *vs.* Young (1890), 134 U. S., 241.

Had defendant filed such plea to the jurisdiction, as was done in *Lehigh Co.* vs. *Kelly,* and being defeated thereon, brought that question with *all the evidence necessary for its proper determination* here for review, a different question would be presented. Having tried the case on the merits, and having been successful, he ought not now to be heard to question the right of the Court to give judgment in his favor.

4. The bill of exceptions was not prepared for the purpose of reviewing any such question. We understand the rule to be that a bill of exceptions cannot be used to bring up all the evidence in the case and should contain only so much of the evidence as is pertinent to the exceptions taken by the defendant party.

Johnston *vs.* Jones (1861), 1 Black, 209.
Lincoln *vs.* Claflin (1868), 7 Wall., 132.
Lewis *vs.* United States (1892), 146 U. S., 370. Opinion of Brewer, *J.*, 383, 384.

The bill of exceptions in this case was prepared in attempted compliance with this rule, and as originally proposed, contained no reference to the facts on which the *successful party* now seeks to impeach his own judgment. But on settlement of the bill the defendant forced into it certain statements as to the facts proved on the trial relating to the unsuccessful attack on the jurisdiction. This statement is very partial and incomplete and omits entirely many important matters proved on the trial, as, for instance, that the creation of a corporation and the transfer to it of the land in dispute was determined on by the parties interested long before it was in fact done, and at a time when it was not possible to bring this or any other action to try the title of the State; that the principal reasons which induced the transfer to the corporation were the ordinary business reasons which usually control in such cases, namely, continuity of ownership free from the embarrassments which result from death, bankruptcy, etc.; convenience of management and full control by the majority in interest; that immediately on the organization of plaintiff a considerable part of its stock was transferred for value to persons who never had any interest in the land as such. The trial Court having entertained jurisdiction, this Court ought not to interfere with its action upon what is really a question of fact without having all the evidence bearing on that fact before it.

Barry *vs.* Edmunds (1886), 116 U. S., 550.
Deputron *vs.* Young (1890), 134 U. S., 241.

(5) The diverse citizenship necessary to confer jurisdiction on the Circuit Court was alleged in the complaint and not denied by the answer, under section 1776 of the New York Code of Civil Procedure, which is as follows:

> "Sec. 1776. In an action brought by or against a corporation the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified and contains an affirmative allegation that the plaintiff or defendant, as the case may be, is not a corporation."

The jurisdiction of the Circuit Court was, therefore, admitted on the record.

> Deputron *vs.* Young (1890), 134 U. S., 241.

(6) The facts appearing on this record do not bring the case within the decision in *Lehigh Mining and Manufacturing Co.* vs. *Kelly*, 160 U. S., 327.

In that case the plaintiff virtually stipulated itself out of court by its agreed statement of facts, one of which was that *the* purpose for which the plaintiff company was organized and the land conveyed to it was to give the Court jurisdiction of that very case; so, also, it was admitted that the stockholders of the new corporation were the same as the stockholders of the corporation which conveyed the land to the plaintiff. In the present case nothing appears as to the motive of the grantors of plaintiff or of the plaintiff itself, except the statement in the bill of exceptions that defendant gave evidence tending to prove that "*one* of the purposes of said corporation was the bringing of this suit in the United States Circuit Court" (Record, p. 20). As to the identity of the stockholders of the new corporation with the former owners, while it appears that such owners became stockholders and took stock in payment for the land conveyed, yet it also appears that the whole stock was not so issued to them, but that two other persons then came in to whom two shares of the stock were issued apparently for cash; and if the

whole evidence were here it would appear that immediately on the organization of the plaintiff one-quarter of its stock was conveyed for value to persons who never had any interest in the land. The brief of defendant virtually admits this (see pp. 42 and 43).

Counsel for defendant seek to get rid of the two shares of stock issued for cash by invoking the maxim *de minimis*. We do not know within what limits this maxim has force. It appears, however, by the present record that if plaintiff establish its title to the lands in controversy the two shares so issued will be worth upwards of $3,200. This results from defendant's own valuation of the property—" upwards of $200,000 " (Record, p. 29; marginal, p. 58), that property being now represented by 122 shares of stock.

The right of a grantee of land to sue for its recovery in a Federal Court, although his grantor could not have done so, is indisputable. The only qualification attached to that rule by this Court in *Lehigh Co.* vs. *Kelly* is that the conveyance of the property must be " a real transac- " tion by which the title passed without the grantor or " vendor reserving *or having* any right or *power* to compel " or require a reconveyance or return to him of the prop- " erty in question " (160 U. S., 336).

If the conveyance be a real one, the motive which induced it is immaterial.

Crawford *vs.* Neal (1892), 144 U. S., 585.

In *Lehigh Co.* vs. *Kelly* the Court declared its intention to adhere to this doctrine (160 U. S., 336).

In the present case, even under the partial statement of the bill of exceptions, the original grantors of plaintiff's cannot, after the land shall have been recovered, *compel* the corporation to reconvey to them *without consideration* all or any part of the corporate property. Such a reconveyance would be in fraud of the right of the other stockholders, even though the stock so held be only two shares; *a fortiori*, is this true on the admission of defendant's brief that still other persons have become owners of

stock of the plaintiff. We submit that the case of *Lehigh Co.* vs. *Kelly* is an authority in support of the jurisdiction, as was held in the case of *Irving Co.* vs. *Bond,* 74 Fed. Rep., 849, a case substantially like the present as regards the question of jurisdiction.

V.

Failure of former owners to pay taxes.

It is urged that the former owners of these lands have paid no taxes since 1852, and that if the sales are not sustained, the arrears, with interest, will amount to $30,000.

The statement of defendant's counsel is broader than the record warrants; but passing that, we do not see that it is any answer to say to a land-owner seeking to defend himself against unlawful taxation that he has not paid the tax.

Another answer to the argument is that as regards any *legal* taxes which went into the illegal *sales,* the lien is not lost, and the State can resell the land according to law if such taxes are not paid. More than this, by chapter 435 of the Laws of 1885, section 22 (Appendix, p. 84, 85), the Comptroller is authorized to relevy any and all taxes found either before or after sale to be illegal or void by reason of any irregularity in the proceedings, and such relevy is made conclusive evidence of its validity, leaving the tax, of course, subject to payment or the land liable to sale for a *valid tax* if it be not paid. The only restriction upon this power to relevy is that the tax should have been based upon a valid assessment.

People *ex rel.* Barnard *vs.* Wemple, 117 N. Y., 77.

The plaintiff if successful in recovering the land will have to play all legal taxes, and all taxes having sufficient

foundation to be legally relevied, together with 10 per cent. interest.

As to taxes which never had any legal foundation whatever,we submit that neither law nor equity requires anything from this plaintiff.

In this way all the just rights of the State will be protected, even if it does lose a tract of valuable land. Tax laws were never intended as a substitute for proceedings under the right of eminent domain or as a means of acquiring land for public use. Says BLACK, on Tax Titles, section 301:

> "Land which is acquired by a public corporation in this manner (*i. e.*, by tax sale), is not regarded in quite the same way as the general public property. This is for two reasons: In the first place, such land is not bought for speculative purposes or for corporate uses, but as a means of enforcing the collection of taxes. In the second place, it is not generally intended that it should be held by the State or municipality indefinitely, but only until some person is found who will take the land and pay the taxes and accrued charges."

VI.

The judgment should be reversed and a new trial ordered.

December, 1899.

FRANK E. SMITH,
THOMAS F. CONWAY,
Counsel for Plaintiff in Error.

N. Y. SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

FERRIS J. MEIGS,
Appellant,

against

JAMES A. ROBERTS, as Comptroller of the State of New York,
Respondent.

42 App. Div., 290,
Advance Sheets
September, 1899.

State tax sales—a bidder's certificate for a portion of a tract, transferred to the State because of his default in payment—the State does not obtain title thereunder to the entire tract—a subsequent purchase at a tax sale by the State, based on the prior sale, is ineffectual—right to maintain an action in ejectment against the Comptroller—purchase of land the subject of controversy—sale of a pretended title.

Section 4 of chapter 453 of the Laws of 1885 (re-enacted in section 13 of chapter 711 of the Laws of 1893) which amended the General Tax Law (Chap. 427, Laws of 1855), by adding thereto section 93, providing as follows: "From and after the advertisement, once a week for three successive weeks, of a list of wild, vacant or forest lands, to which the State holds title from a tax sale or otherwise, in one or more newspapers to be selected by the Comptroller, published in the county in which such lands may be located, all of such wild, vacant or forest lands shall be deemed, and are hereby declared to be, in the actual possession of the Comptroller of this State; and such possession shall be deemed to continue until he has been dispossessed by the judgment of a competent tribunal," was designed to enable a person claiming title to land conveyed to the State of New York under a tax deed from the Comptroller, to attack the validity of the State's title in an action of ejectment brought against the Comptroller, although such lands may be within the Forest Preserve.

Where a specific portion of a lot offered for sale at a Comptroller's tax sale is bid off in 1881 for the amount assessed against the entire tract, and after the notice of redemption has been given the bidder's certificate is transferred, for a default of the purchaser in the payment of his bid, to the State under

section 48 of chapter 427 of the Laws of 1855, as amended by chapter 152 of the Laws of 1878 and by chapter 402 of the Laws of 1881, which provides that in such a case the State shall be deemed to have purchased the entire plot liable to be sold, for the purchase money mentioned in the certificate, the State does not acquire title thereto.

The defect in the State's title is jurisdictional, and is not cured by chapter 448 of the Laws of 1885, which provides that conveyances executed by the Comptroller shall, after having been recorded for two years in the office of the clerk of the county in which the land is situated, be conclusive evidence that the sale and all proceedings prior thereto were regular.

The purchase by the State of the lands at a subsequent tax sale at which no competition was allowed, as provided in section 5 of chapter 402 of the Laws of 1881, amending section 66 of the Tax Law of 1855, is a mere assertion of ownership under the previous conveyance and confers no additional title on the State.

A deed executed while the grantors are prosecuting a proceeding before the Comptroller to vacate a tax sale of the premises to the State, is not within the condemnation of section 129 of the Penal Code, making it a crime to accept a conveyance of lands which are the subject of controversy by suit in any court.

Such a deed cannot be treated as a sale of a pretended title within the meaning of section 130 of that Code.

Appeal by the plaintiff, Ferris J. Meigs, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the Clerk of the County of Franklin on the 22d day of October, 1898, *upon the decision of the Court rendered after a trial at the St. Lawrence Special Term dismissing the complaint.*

John P. Badger, for the appellant; J. C. Davies, Attorney-General, and Theodore E. Hancock, for the respondent.

Parker, *P. J.*—The action is ejectment to recover from the defendant the possession of about 585⅜ acres of land. Such land is wild and uncultivated, situated in Franklin County, within the limits of the Forest Preserve, and it is claimed that the defendant, as Comptroller of the State, is in the actual possession thereof, and that this action may be maintained against him by reason of the provisions of section 13 of chapter 711, Laws of 1893. The Comptroller had, under the provisions of that section, ad-

vertised such lands as lands to which the State holds title; and this action is evidently brought to determine the validity of such claim. The trial Judge, after taking all the evidence offered by both sides upon the issues presented, dismissed the complaint upon the ground that the action was one against the State, and, therefore, could not be maintained. And from the judgment entered on such decision this appeal is taken.

The provisions of the above section were first enacted in section 4 of chapter 453 of the Laws of 1885, amending chapter 427 of the Laws of 1855. The phraseology of that section, which is not substantially changed by the one above cited, was as follows:

"Sec. 93. From and after the advertisement, once a week for three successive weeks, of a list of wild, vacant or forest lands, to which the state holds title from a tax sale or otherwise, in one or more newspapers to be selected by the comptroller, published in the county in which such lands may be located, all of such wild, vacant or forest lands shall be deemed, and are hereby declared to be, in the actual possession of the comptroller of this state; and such possession shall be deemed to continue until he has been dispossessed by the judgment of a competent tribunal."

At that session of the Legislature two other acts were passed which have some bearing upon the question here presented. One, the act creating the Forest Commission, being chapter 283, Laws of 1885; and the other being chapter 448 of such laws, which amends section 65 of the general act regulating the collection of taxes, to wit, chapter 427 of the Laws of 1855. The owners of lands which had been previously sold for taxes in this large tract of wilderness were in many instances claiming that the taxation and proceedings thereunder had been irregular and without authority, and that the conveyances which the State had given under such proceedings were, therefore, void, and frequent applications had been made by the owners to the Comptroller to vacate such sales and

the conveyances given thereon. The courts had held that such a remedy was not open to the owner, and that he must establish his title as against the one given upon the tax sale by his action of ejectment in the courts of the State (*People* ex rel. *Wright* vs. *Chapin,* 104 N. Y., 369; *People* ex rel. *Millard* vs. *Roberts,* 151 Id., 540).

With the view, evidently, to check the litigation which was increasing under such claims, the 65th section of the General Tax Law was amended by the act above cited so as to substantially provide that all the conveyances previously executed by the Comptroller, which up to that time had been presumptive evidence only, should, six months after such act took effect, and after having been recorded for two years in the office of the clerk of the county wherein the lands were situated, be *conclusive* evidence "that the sale and all proceedings prior thereto, from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto." And the conveyances thereafter executed or previously executed, but thereafter recorded, were thereby made conclusive evidence of the regularity of such proceedings and matters from and after the expiration of two years from the date of its record. The provisions of this act which gave to the owner six months' time in which to attack the validity of the proceedings under which the conveyances theretofore recorded for two years were issued, and which limited all owners in subsequent cases to the two years after the recording of such conveyances in which to attack their validity, were evidently incomplete and unjust, if there were no provision by which the owner might bring before some judicial tribunal the question of its validity in those cases where the State itself was the purchaser or the grantee. It was household law that, unless specially authorized by statute, no action could be maintained

against the State in its own courts to test the title which it claimed under such a conveyance, and the courts had determined that the owner had no standing before the Comptroller to procure a vacation by him of the sale and conveyance. Hence, the owner was without remedy, unless perchance he could provoke the State to test the issue in some proceeding instituted by it against himself.

Such was the situation under which the section first above quoted was enacted. It was passed upon the same day that the statute last-above cited was passed and took effect at the same time. And it is also an amendment of the General Tax Law of 1855 by adding section 93 thereto. Clearly, it seems to me, that the purpose of such section 93 was to supplement and give fair effect to the amendment of section 65, and to make the way clear for the owner to assert and enforce his rights as against the title which the State claimed in any conveyance issued to it by the Comptroller. The easiest and usual way to procure an adjudication as to the ownership of lands was to bring an action of ejectment against the party who was in possession claiming the same. As to those lands which the State claimed under a conveyance made upon a sale for taxes, it was deemed just to at once take possession and permit an action of ejectment to be brought to test such claim. Particularly was it just after the amendment of section 65, above cited. Hence, the passage of section 93, the plain intent and meaning of which, it seems to me, was to assume, on behalf of the State, the actual possession of all such lands in the name of the Comptroller and to permit an action to be maintained to dispossess him of such possession, and thus test the title of the State to the same. If such was not the purpose and meaning of the section, I cannot see that it has any force or effect whatever.

In *People ex rel. Millard* vs. *Roberts* (151 N. Y., 540, 542) this plaintiff's grantors had made application to vacate the tax sale of 1885 of the very lands in question here

on the grounds of irregularity in the tax, and claimed that because the *State* had become the purchaser and grantee, such a proceeding might be maintained. But the Court of Appeals, affirming the judgment of this court (8 App. Div. 219), held that the same rule was applicable when the State was the grantee, as had long been applied when the conveyance was to third parties; that the remedy of the owner was not before the Comptroller, but by action in the courts. It was said in that case (p. 543): "If the sale is invalid his title is not affected, and he may keep and defend his possession, or, if put out of possession, he may regain it by action of ejectment." In that case the court was speaking of the very lands in question here, and of a sale thereof under which the defendant in this action seeks to justify his possession and sustain the title of the State. It seems very clear that the advertisement by the Comptroller, under the above-cited 96th section, operated to put the *actual* possession of the lands in the Comptroller, and thus not only to deprive the owners of it, but also to prevent their ever actually acquiring it. And I know of no authority under which an action could be brought to regain it other than the section in question. It would seem that such decision is substantially an authority to that effect.

It is claimed that the Forest Commission has the possession of all lands within the limits of the Forest Preserve, and that, if it could be maintained at all, this action should be brought against it. By section 1 of chapter 283 of the Laws of 1885, the "care, custody, control and superintendence of the forest preserve" is given to that commission, but that act was passed and took effect May 15, 1885, and the section 93 above-cited was passed and took effect June 9, 1885. If the two are so inconsistent that both cannot exist, the earlier must yield to the later act. But, in my opinion, they do not conflict. The Forest Preserve consists of all the lands within certain specified limits which are owned by the State, and of this large tract of

land the commission is given the care, custody and control. It is the duty of that department to take all those proceedings and do all those acts which are necessary to fully protect the same, and secure to the State the benefit to be derived from its possession. But such care, custody and control need not necessarily interfere with the legal possession being held by the Comptroller for the benefit of the State.

So long as there is conflict and doubt over the title of any particular parcel, it is not certain that it is owned by the State, and, therefore, not certain that it is in the Forest Preserve. Therefore, it may well be that the actual possession which the State was willing to assume, to the end that the alleged owner might bring ejectment to establish his title, should be placed in the Comptroller. The question of actual possession is of importance only to those who, claiming to be owners, wish to attack the title of the State; and as to such lands the possession is given to the Comptroller without at all conflicting with the commission's care and custody of the Forest Preserve.

In *Saranac Land & Timber Co.* vs. *Roberts* (68 Fed. Rep. 521) the Circuit Court of the United States has held that, under this section, an action of ejectment may be maintained against the Comptroller, and, in my judgment, such construction of the statute is correct.

It remains to be determined whether, for any other reason, the complaint should have been dismissed.

The plaintiff has the title to the 585$\frac{3}{8}$ acres in question, unless the State has acquired it under the proceedings of 1881 or 1885, to sell the lands for taxes.

In November, 1881, such lands were offered for sale by the Comptroller in payment of delinquent taxes assessed against them for several years prior thereto. At such sale, a certain specific 100 acres thereof were bid off by one Talmadge for the full amount of taxes assessed against the tract, and a certificate to that effect was issued to him. On April 25, 1883, a notice was published by

the Comptroller to the effect that such 100 acres, describing them, were sold for arrears of taxes in November, 1881, and were still unredeemed, and that the sum of $112.92 must be paid by the 23d day of November, 1883, in order to redeem the same, otherwise a conveyance would be made to the purchaser thereof. In that notice the whole 585⅜ acres were given as the tract against which the taxes were assessed, and the 100 acres as the part thereof sold. Subsequently, on October 31, 1884, Talmadge having made default in the payment of his bid, and no redemption having been made by the owner, the Comptroller canceled the certificate to Talmadge and conveyed the whole 585⅜ acres to the State.

It is claimed by the plaintiff that such conveyance was utterly unauthorized and void.

It would seem that, up to the sale and issuing of a certificate to Talmadge, the proceedings were undoubtedly regular.

By section 47 of chapter 427, Laws of 1855, the Comptroller is given authority to cancel such a certificate at any time after three months, in case the purchaser shall not have paid the amount of his bid, or the same has not been collected from him. In the event that he does so cancel it, the Comptroller may either sell such certificate to any one who will pay the amount due upon it, or, if such sale cannot be made, he may transfer the same to the People of the State. Such was the provision of section 48 of the said chapter. By section 49 of such act, it was provided that the certificate issued to the new purchaser conferred upon him the same rights as he would have acquired had he been the successful bidder at the sale.

The statute also gave to the owner the right to redeem from the sale at any time within two years thereafter; and by section 61 it was provided that at least six months before the expiration of such two years the Comptroller should publish in each county a notice of the lands therein sold for taxes and still unredeemed, and the amount neces-

sary to redeem the same, and stating that unless redeemed by a specified day such lands will be conveyed to the purchaser.

Under these sections it is manifest that, in cases where the purchaser had made default and the certificate had been transferred to the State, the statements required to be made in the notice of redemption were, nevertheless, sufficient to apprise the owner of the actual situation. The amount to be paid was the same as if the original purchaser still held the certificate, and the lands sold and to be redeemed were the same, the State having taken under the certificate no more than the purchaser took.

But, by chapter 152, Laws of 1878, and section 3 of chapter 402, Laws of 1881, section 48, above cited, was amended so as to provide that, in all cases where the People of the State become the purchaser *by such transfer*, the whole quantity of land liable to sale for the purchase money mentioned in such certificate shall be covered by such purchase, the same as if no person had offered to bid at the sale.

Here was a radical change in the rights given to the State upon the acquisition of such a certificate; and it is manifest that if such change is not made until after the notice of redemption is given, its contents, instead of informing the owner, must mislead and deceive him.

Thus, in the case at bar, when the notice of redemption was given, Talmadge still held the certificate and stood in the position of purchaser. Although in default as to his payment, his certificate had not been canceled, nor had the State acquired it. The statement in the notice of redemption was correct—100 acres only had been sold, and those acres only were remaining "unredeemed." The owner, being so informed, chose to allow those acres to go unredeemed and thus pay the tax upon the rest. But after such notice, and after such action on the owner's part, the certificate upon which Talmadge had long been delinquent is canceled by the Comptroller, and the whole

585¾ acres are conveyed to the State. Not only has the owner had no notice that his 585¾ acres had been sold and must be redeemed, but, in effect, he has been told that only 100 acres thereof had been sold, and that the rest need not be redeemed. And, as a matter of fact, no more than 100 acres ever have been sold at a sale where competitive bidding was allowed.

Since the amendment of section 48, the claim of the State is that, having taken an assignment of the certificate, it has, under that section, become the purchaser of the whole 585¾ acres, the same as if it had bid off the same for want of other bidders at the time they were exposed for sale. But if such is the situation, then there has been an utter failure to give the notice of redemption required by the statute. Nor is it possible to give such a notice in any such case, unless the purchaser's certificate is canceled and the transfer made to the State before the expiration of eighteen months within which time the notice of redemption must be given. In other words, since the amendment it becomes necessary to vacate the purchaser's certificate and transfer the purchase to the State before the notice of redemption is given; and if such change is made after the notice, it is in effect as if no notice of redemption whatever had been given. Hence the proceeding, and the conveyance under it, gave no title to the State (*Bunner* vs. *Eastman*, 50 Barb., 640).

It is claimed, however, that such errors are cured by the statute of 1885 (chap. 448), above cited.

It has been held that such statute does not cure jurisdictional defects; and in *Ensign* vs. *Barse* (107 N. Y., 329), what are to be deemed jurisdictional in the sense so used is clearly pointed out (see, also, *Joslyn* vs. *Rockwell*, 128 N. Y., 334). I am of the opinion that the appropriation of the whole tract of 585¾ acres by the State, without any sale of the same, and after a notice to the owner that only 100 acres thereof had been sold and were to be redeemed, was a jurisdictional defect within the above decisions.

As to 485⅝ acres of his lands, the owner has never had any notice that the State had sold or appropriated or would sell or appropriate the same in satisfaction of the tax against them.

I conclude, with reference to the tax sale of 1881, that the State has acquired no title to the lands in controversy.

As to the sale of 1885, the same lands were again advertised for sale on acount of delinquent taxes for 1877 to 1882 inclusive, and bid off by the State, and a conveyance executed to it. Such sale was subsequently canceled by the Comptroller on the application of Millard and others, as owners; but such cancellation was utterly nugatory and did not at all affect the title of the State (*People* ex rel. *Millard* vs. *Roberts*, supra).

But, on such sale, we must assume that no competition whatever was allowed. By section 5 of chapter 402 of the Laws of 1881, amending section 66 of the Tax Law of 1855, it is provided that the Comptroller shall bid off all lands then belonging to the State, and shall reject any and all bids which may be made for any or all of said lands. These lands were then held by the State under the conveyance of October, 1884, and, therefore, the actual proceeding in 1885 was but an appropriation of the lands, without sale, to satisfy the taxes against them. It was but an assertion of ownership under the deed of October, 1884, and could not, in itself, add anything to the title which that conveyance gave (*Cromwell* vs. *MacLean*, 123 N. Y., 474, 489; *Turner* vs. *Boyce*, 11 Misc. Rep., 502, 512).

In order to render the conveyances to the plaintiff void for champerty, it must appear that, at the time they were taken, the lands were in the actual possession of the State, and that it was claiming under a title adverse to that of his grantors (*Dawley* vs. *Brown*, 79 N. Y., 390). Confessedly, all these lands were wild and unoccupied, not in the actual possession of any one, except so far as section 93 of the act of 1855, as amended in 1885, above cited, puts the actual possession in the Comptroller. Concede

that such possession was sufficient to render a conveyance champertous, yet the evidence does not disclose that any such possession had been acquired by the Comptroller prior to the advertisement begun on December 22, 1894. Before that time he had no possession whatever, and any conveyance taken by the plaintiff prior to that date is not to be discredited on that ground. It appears from the record that plaintiff holds title to these lands through two sources —one through the McCormick patent, issued by the State in 1798. Some of the conveyances to plaintiff transferring to him undivided interests in this title, were made prior to the date of such advertisement, and some subsequently to it. Such as were made prior to it were not champertous. The other source of the plaintiff's title is through a deed from the Comptroller to Turner and Marsh, executed December 21, 1891, and by them conveyed to the plaintiff, Turner conveying October 29, 1894, and Marsh conveying May 15, 1894. Both of such conveyances are prior to the Comptroller's advertisement, and, therefore, as to them, he was not in the actual possession when they were taken.

For these reasons it cannot be said that plaintiff's complaint should have been dismissed because his deeds were void for champerty.

Nor do I think that it can be said such lands were, at the time, the subject of controversy by suit in any court, within the meaning of section 129 of the Penal Code. These proceedings were before the Comptroller, and as matter of fact were dismissed because Millard and Ostrander had no right whatever to institute them. They were not proceedings that could in any way affect the title which they assumed to convey to plaintiff. Nor can the conveyances from them, or from Turner and Marsh, be treated as a sale and purchase of a pretended title in violation of section 130. Although no one had the *actual* possession, yet the title of Turner and Marsh, coming directly from the State and from them to the plaintiff, the con-

structive possession which follows such title, in the absence of any adverse holding, is sufficient to relieve it from the condemnation of that statute (*Wright* vs. *Syracuse, etc., R. R. Co.*, 92 Hun, 32).

Moreover, as I understand this record, the State on December 21, 1891, conveyed those lands to Turner and Marsh. The deed is not before us, but I do not understand that it assumed to then convey any less title than the State then had. It seems to have been introduced by the defendant to show title out of plaintiff, and thus defeat his action of ejectment. But the plaintiff replies by showing a conveyance of that title from Turner and Marsh to himself. Thus, under this title, he seems to have established his right as against the State, to the lands in question, even though the State did acquire a good title to the same under the sale of 1881 and 1885. Whatever title the State acquired through those sales, would seem to have passed by its conveyance to Turner and Marsh in 1891.

Thus, if this action could be maintained at all, there does not seem, on this record, to be any reason why the title of the plaintiff is not good as against the State, and, therefore, the complaint should not have been dismissed.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred, except Merwin, *J.*, dissenting, and Putnam, *J.*, not sitting.

Judgment reversed and a new trial granted, costs to abide the event.